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Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 126

CHARLES E. MERRILL, PETITIONER,

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAM R. MARKS,
Jacksonville, Florida,
Counsel for Petitioner.

FRANCIS M. HOLT,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Your petitioner Charles E. Merrill prays that a writ of certiorari issue to review the judgment entered May 3rd, 1944, by the United States Circuit Court of Appeals for the Fifth Circuit in the above cause, which was No. 10874 in that Court, and in that behalf shows:

SUMMARY STATEMENT.*

On March 8, 1939, your petitioner, Charles E. Merrill, was married to Kinta Desmare at Pensacola, Florida. On the preceding day petitioner and Miss Desmare had exe-

*(Page references are to the printed record.)

cuted a contract (R. 12) whereby she agreed to release all statutory dower and marital rights in petitioner's property and estate upon condition that he would within a ninety-day period create certain trusts for her benefit. As disclosed by the record (R. 8, 13, 36) there were good and sufficient reasons impelling said parties to execute that prenuptial contract. After the marriage and within said ninety-day period and pursuant to the agreement petitioner created for his wife an irrevocable trust (R. 20) to which he transferred $300,000. Petitioner duly reported this transaction but claimed it non-taxable as a gift (R. 28, 29); the Treasury Department disagreed and petitioner was assessed a $99,000 deficiency gift tax for the year 1939 (R. 30, 31). Protest (R. 33) being overruled (R. 42) and claim for refund denied (R. 50), petitioner paid the tax and brought this action against the Collector to enforce refund. Petitioner's contention has been and is that the payment of funds to the trust was not a gift but was a transfer for full and adequate consideration flowing to him, in money or money's worth, viz., his wife's release of her statutory dower and marital rights. The facts in the case were stipulated (R. 7-12). It was conceded by the Government that the transactions between petitioner and his wife were conducted in good faith (R. 9); it was further conceded that the actuarial computation submitted by petitioner to the Bureau of Internal Revenue (R. 40-41) to evaluate the marital rights released to him was correct and based upon an appropriate formula, if it is possible to place a money value upon the wife's dower interest under the facts in this case (R. 11). Said computation disclosed the value of the rights released by the wife to have exceeded by a substantial margin the sum paid by petitioner to the trust. The District Court made findings of fact (R. 57) and stated conclusions (R. 64) and rendered opinion (R. 65) which is reported in 51 F.

Supp. 120, holding that the rights so released could constitute "adequate and full consideration in money or money's worth" within the true intent and meaning of the gift taxing statute and, upon an appraisal of the value of the rights relinquished, further found and held that plaintiff received full and adequate consideration for his transfer of funds to the trust. Judgment for refund of the tax was accordingly entered against the Collector (R. 71). On appeal to the Circuit Court of Appeals for the Fifth Circuit, this judgment has been reversed by a divided court and that is the decision sought to be reviewed—the opinion will be found in the record of this case at page 88 and the reversal order at page 102.

STATUTE INVOLVED AND JUDICIAL RIGHT TO REVIEW.

The statute involved is the Revenue Act of 1932, Sections 501 and 503 (26 U. S. C., Secs. 1000, 1002).

"Sec. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *"

"Sec. 503. Transfer for Less Than Adequate and Full Consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall,

for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

The aforementioned decision of the United States Circuit Court of Appeals for the Fifth Circuit was rendered against petitioner on May 3rd, 1944, and under Section 240 (a) of the Judicial Code (28 U. S. C., Sec. 347), this Court has jurisdiction to review that decision.

QUESTIONS PRESENTED.

The record presents the question of statutory construction whether an *inter vivos* transfer by husband of funds to an irrevocable trust for his wife, pursuant to prenuptial agreement and in exchange for her release of statutory dower and marital rights in his property and estate, is *necessarily* a gift and subject to imposition of gift tax because the law contemplates that such rights may not constitute, *to any extent*, a consideration in money or money's worth.

If above question be answered in the negative, then we have the subsidiary question:

Whether the marital rights here released were susceptible of appraisal or valuation and were shown to have equaled in value the sum transferred by the husband to the trust.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

This case involves an important question of gift tax law which has not been but should be settled by this court. On the hearing before three judges of the Fifth Circuit Court of Appeals, two of them have rendered the

decision which finds no direct precedent support except in an opinion rendered by the First Circuit Court of Appeals June 27, 1941, and reported as *Commissioner* v. *Bristol*, 121 F. 2d 129. Of the opposite viewpoint and in conflict therewith are aligned the Court of Appeals for the Third Circuit (*Ferguson* v. *Dixon*, 300 Fed. 961; *McCaughn* v. *Carver*, 19 F. 2d 126); the Court of Appeals for the Seventh Circuit (*Lasker* v. *Commissioner*, 138 F. 2d 989); The Court of Claims (*Stubblefield* v. *United States*, 6 F. Supp. 440); the Tax Court in several cases (*Bristol* v. *Commissioner*, 42 B. T. A. 263; *Jones* v. *Commissioner*, 1 T. C. 1207; *Wemyss* v. *Commissioner*, 2 T. C. 111); in addition to the District Court and dissenting C. C. A. opinions rendered in the instant case.

Thus the rights of petitioner have become enmeshed in the flow of conflicting judicial opinions, as to what is the true and correct interpretation of the gift taxing statute as applied to marital settlements, and unless this Court will assume jurisdiction and determine this controversy, petitioner is without remedy and others having similar transactions must either pay or will be permitted to escape taxation according to the locality and viewpoint of the Judge in the place where such parties may chance to reside at the time of the particular event or transaction.

Charles E. Merrill,
Petitioner,

By Sam R. Marks,
of Jacksonville, Florida,
Counsel for Petitioner.

Francis M. Holt,
Jacksonville, Florida,
Of Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

The case calls for a construction of Sections 501 and 503 of the Revenue Act of 1932.

The brief of the Assistant Attorney General, filed in the Circuit Court of Appeals, stated the question as follows:

"Question Presented.

"In 1939 the appellee * * * transferred certain funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an ante-nuptial agreement between them.

The question is whether the amount of such transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon 'adequate and full consideration in money or money's worth' within the meaning of Section 503 of that Act."

In support of the Government's position it was argued (1) that the release by the transferee-wife of her Florida dower rights was not susceptible of monetary evaluation; (2) that the gift tax law does not contemplate that release of dower or analogous rights shall constitute consideration *to any extent* and (3) that the decision of the District Court nullified two major purposes of the gift tax enactment (a) to prevent or compensate for the avoidance of estate taxes and (b) to prevent the break-up of large estates within families for the purpose of avoiding the higher income tax brackets by distribution of income. It was said in the brief of counsel for the Government:

"We do not believe that a construction of the gift tax law productive of these results or either of them is correct in view of the well understood purpose of Congress to integrate the three kinds of tax."

The foregoing will serve to inform the court of the Government's position below, out of which developed the decision sought to be reviewed and which petitioner thinks should be reviewed for the reasons hereinafter set forth.

STATEMENT OF THE CASE.

The accompanying petition for certiorari contains summary statement of the facts and history of the case and specifies the question which petitioner seeks to have determined by this Court. The Government's statement of the same question is quoted in the foregoing preliminary statement.

Petitioner contends that the Fifth Circuit Court of Appeals erroneously construed Section 503 of the Revenue Act of 1932 in holding that, by transferring funds to an irrevocable trust for his wife, petitioner made her a taxable gift. Petitioner believes that such transfer was for "adequate and full consideration in money or money's worth."

OPINIONS BELOW.

The District Court opinion in favor of petitioner was rendered June 24, 1943, and will be found at page 65 of the record; it is reported in 51 F. Supp. 120.

The opinion of the Fifth Circuit Court of Appeals was rendered May 3, 1944 (R. 88), it was written by Judge Sibley, concurred in by Judge McCord. Judge Waller filed a dissenting opinion. This decision has not yet been reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C., Sec. 347).

ARGUMENT.

For the Federal Courts to evaluate marital rights presents no new tax question; the only thing new is the recent tendency of some courts to depart from precedents.

As far back as 1924, the Court of Appeals for the Third Circuit decided in a case quite similar to this one, where the parties had made a prenuptial agreement and created a trust, that the transaction was of a business character, a *bona fide* sale or exchange, and that the dower rights released by the wife were consideration in money or money's worth, within the true intent and meaning of the Federal statute, for the bonds delivered by the husband to the trust. *Ferguson* v. *Dickson,* (C. C. A. 3) 300 Fed. 961.

The next decision was in 1927, the case of *McCaughn, Collector,* v. *Carver,* also by the Third Circuit and reported in 19 F. 2d 126. It was there held that where the husband had made an irrevocable transfer of a fund in trust in consideration of the wife's relinquishment of her dower, a tax paid under protest was recoverable because the circumstances disclosed a *bona fide* sale for a fair consideration in money or money's worth.

The next decision to be mentioned is *Stubblefield* v. *United States,* decided by the Court of Claims in 1934 and reported in 6 F. Supp. 440. It was there held that when the wife of a grantor exacted a portion of the purchase price for surrendering her inchoate dower rights, the money received by her in the transaction was based on consideration and was not a gift. A similar holding had been made in 1926 by the District Court for the Southern District of Florida in the case of *Mason* v. *United States,* reported in 17 F. 2d 317.

While the several decisions above mentioned involved laws in effect prior to 1932 when the present gift tax statute was enacted, they are none the less valuable as precedents; for they dealt with *inter vivos* transactions alleged to have been without consideration, mere gifts, and effort was made to bring them within the scope of the statute taxing transfers other than those made *bona fide* and for a money's worth consideration.

When the gift statute was enacted in 1932, Congress inserted substantially the same phraseology viz. "where property is transferred for less than an adequate and full consideration in money or money's worth" and it necessarily knew the courts had theretofore accorded to marital rights the status of a money's worth consideration.

It is true Congress had in 1926 amended the estate tax law to specify that any such consideration should be "full and adequate" rather than merely "fair" but if marital rights were a money's worth consideration before that amendment, as had been held, they were none the less so after it--the amendment merely served to impose upon the courts the duty of measuring and evaluating the consideration in each particular case. *Bristol* v. *Commissioner*, 42 B. T. A. 263.

The courts have found no difficulty in valuing rights considerably more intangible and elusive than the wife's right of dower. *Commissioner* v. *Marshall*, (C. C. A. 2) 125 F. 2d 943; see also *Smith* v. *Shaughnessy*, 89 L. Ed. 504, and Paul on Federal Estate & Gift Taxation, Volume II, Chapter 18, Section 18.03 *et seq.* The courts may not abdicate their function of deciding valuation questions because mathematical accuracy is difficult or even impossible. *Guggenheim* v. *Helvering*, (C. C. A. 2) 117 2d 469.

As bearing upon the valuation of marital rights, capital gains taxes have been imposed upon the husband

for securities delivered pursuant to settlement agreement made with the wife. *Commissioner* v. *Mesta* (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Halliwell*, (C. C. A. 2) 131 F. 2d 642.

When Congress enacted the Revenue Bill of 1932 providing for gift taxes, it inserted in the same law some estate tax amendments. Section 804 of Title VI of the Revenue Act of 1932 (Estate Tax Amendments) specified that "for the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" *Similar language was omitted from the gift tax section* (Title III, Section 503) and the only reasonable inference is that such omission was deliberate. This was the view adopted by the Board of Tax Appeals when in 1940 it decided the *Bristol case* (42 B. T. A. 263).

On the facts, the Bristol case was quite similar to this Merrill case and in denying the taxable character of the transaction, the Board said in part:

> "The gift tax under consideration was imposed by the Revenue Act of 1932, the same act that amended the 1926 Act respecting estate tax as above noted. Both the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports. Nevertheless, the amendment was made specifically applicable to the estate tax and was omitted from the gift tax provisions. The only logical conclusion in the light of such facts is that, with both taxes before it, the Congress did not intend the interpretative restriction placed around the estate tax to apply to the gift tax and that the omission thereof from the gift tax provisions

was deliberate. We are of the opinion, accordingly, that the relinquishment of dower or other marital rights may, under the gift tax statute, be adequate and full consideration in money or money's worth. The adequacy of the consideration in a given case is a question of fact."

In determining the adequacy of the consideration and in estimating the money value of the wife's marital rights, the Board made use of a simple mathematical formula such as the Treasury Department has approved of for evaluating future estates or interests in expectancy (Gift Tax Regulations 79, Article 19) and found no difficulty in arriving at a result satisfactory to it. In the instant case the taxpayer supplied an actuarial formula and computation which the Government conceded to be correct (R. 11) "if it is possible to place a money value upon the wife's dower interest, under the facts in this case."

On appeal to the Court of Appeals for the First Circuit the decision of the Board in the Bristol case was reversed (*Commissioner* v. *Bristol*, 121 F. 2d 129) and the following new theories were advanced:

"Consideration" as used in Section 503 of the Revenue Act of 1932 is not the same thing as common law consideration.

Release of dower and analogous rights cannot be regarded as consideration for purposes of the gift tax.

To hold otherwise would frustrate the purpose of the gift tax in its chief role as protector of the estate and income taxes

The Board of Tax Appeals, now the Tax Court, has been most reluctant to adopt the viewpoint of the First Circuit Court of Appeals as expressed in the Bristol opinion and has subsequently said regarding it:

"We have not, however, departed from the view expressed in our opinion in that case. Moreover, the comparatively recent decision by the Second Circuit in *Commissioner* v. *Beck's Estate*, 129 F. 2d 243, is especially significant. In that case it was urged that the estate and gift tax provisions of the statute, being complementary, should be integrated for purposes of construction. Similarly rejecting this theory the court held that these provisions, though complementary, were separate and distinct in themselves and that the silence of Congress in its failure to require the integration of their provisions was 'strident.'"

Above excerpt is from the opinion in *Jones* v. *Commissioner*, 1 T. C. 1207, and again in the case of *Wemyss, Petitioner*, v. *Commissioner*, 2 T. C. 111, after referring to the Bristol case, the court said:

"We have subsequently expressed our belief that the basic principle upon which decision was reached is sound (*Herbert Jones*, 1 T. C. 1207, 1209) and the District Court for the Southern District of Florida recently chose to follow it 'rather than the contrary view set forth' in the opinion of the Circuit Court. *Merrill* v. *Fahs*, ___ F. Supp. ___ (June 24, 1943). But an attempt to apply it here could not aid petitioner; for no property or property rights of his prospective wife, vested, contingent, or inchoate, were transferred by her to him. All that he received was her promise to marry him."

It will be observed from the last preceding quotation that the Tax Court took notice of the District Court's opinion in this Merrill case and apparently approved of it. As this court has recently said in *Dobson* v. *Commissioner*, 88 L. Ed. 179, no administrative rulings are entitled to higher credit than those of the Tax Court.

Meanwhile the case of *Lasker* v. *Commissioner* found its way to the Court of Appeals for the Seventh Circuit

and was decided December 4, 1943, 138 F. 2d 989. There the parties had made a pre-nuptial agreement and later negotiated a marital settlement. On this a gift tax was imposed and, in support of the tax, counsel for the Government advanced the same reasons which have been urged here, namely: that the marital rights and claims released by the wife were not the equivalent of a money's worth consideration and were too indefinite and contingent to be measured in terms of dollars. The court, however, took the view that the over-all result of the dealings between the parties should be looked to in ascertaining whether the consideration was adequate; viewed in this light, the court thought there could be no doubt buf that the husband received full value for the payment made by him and held the transaction to be tax free. It was further observed that the language of Treasury Regulations 79, Article 8, was sufficient to warrant decision for the husband, the transaction amounting to a sale or exchange *bona fide*, at arm's length free from any donative intent. The court declined to adopt or follow the reasoning of the Bristol case, pointing out that the Tax Court had taken a similar position and further saying:

> "Not only has the Tax Court refused to follow the reasoning of the Bristol case, but so has the District Court in *Merrill* v. *Fahs, Collector*, (D. C.) 51 F. Supp 120. *We agree with the reasons given by the court in the latter case for its refusal to follow the Bristol case.*"

It therefore seems fair to conclude that petitioner suffered an adverse ruling because his case necessarily had to be heard before the Fifth rather than the Seventh Circuit Court of Appeals; for, as above shown, the latter court had to all intents and purposes affirmed the District Court ruling before the former court heard the case. It

is also to be noted that only three judges sat on the Appellate Court and that one of them strongly dissented. In other words, petitioner's case has been considered by one District Judge and three Appellate Judges, four in all, two of whom think he suffered an unlawful tax while the other two vote to sustain the validity of it. While the opinion rendered by Judge Sibley and concurred in by Judge McCord takes notice of both the Bristol and Lasker decisions, the theory of the Bristol case is adhered to only in part and the Lasker decision is attempted to be distinguished but upon a clearly untenable ground as is forcefully shown by Judge Waller's dissent.

The several decisions on this subject of marital rights as related to gift taxes are certainly in a state of confusion and discord and since the sum paid by petitioner for a tax was quite substantial, in fact large, this case would seem to be one where we are justified in asking even this busy court to review the record on certiorari and give appropriate relief.

Respectfully submitted,

SAM R. MARKS,
Attorney for Petitioner.

FRANCIS M. HOLT,
Of Counsel.